Filed 10/25/16 Marriage of Champ CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of KAREN S. and GEORGE F. CHAMP.	
KAREN S. CHAMP, Respondent, v. GEORGE F. CHAMP, Appellant.	G052475 (Super. Ct. No. 10D007538) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Salvador Sarmiento, Judge. Affirmed.

Law Offices of Michel and Rhyne, Karen A. Rhyne; Hickman & Carrillo and Gale Patrick Hickman for Appellant.

Law Offices of Marjorie G. Fuller, Marjorie G. Fuller; Hittelman Strunk Law Group and Steven G. Hittelman for Respondent.

* * *

INTRODUCTION

Karen S. Champ and George F. Champ were married in 1996 and separated in June 2010.[1] George did not appear for trial on Karen's petition for legal separation and the division of their many assets. In December 2013, judgment was entered in which, inter alia, the trial court divided interest in two residential properties between the parties and confirmed two Charles Schwab IRA's as Karen's separate property. George did not request a statement of decision or appeal from the judgment. In June 2014, George filed a motion to vacate the judgment under Code of Civil Procedure section 473, subdivision (b), on the grounds that he had failed to attend the trial because he fell asleep and that Karen had failed to disclose his separate property interests at trial. George's motion to vacate was denied; he did not appeal from the order denying that motion.

In March 2015, George filed a request for an order under Family Code section 2556, in which he sought reimbursement for the amount of his separate property he had contributed to the two residential properties addressed in the judgment, and also the characterization and division of the $50,000 pretrial advance payment he was ordered to pay Karen. George further challenged the trial court's confirmation in the judgment that the two Charles Schwab IRA's were Karen's separate property, as in excess of the court's jurisdiction in violation of section 580 of the Code of Civil Procedure. The trial court denied George's request. George appeals from the order denying the request.

We affirm. George's separate property contributions in the residential properties adjudicated in the judgment did not constitute omitted or unadjudicated community estate liabilities within the meaning of Family Code section 2556. George's unsuccessful prior postjudgment attempt to obtain reimbursement of his separate property contributions in those residential properties was also barred by the doctrine of res judicata. Our record does not show the $50,000 payment that George made to Karen was

[1] We refer to the parties by their first names for the purpose of clarity and intend no disrespect.

unadjudicated in the judgment. Code of Civil Procedure section 580 did not preclude the trial court from confirming the two IRA's as Karen's separate property.

BACKGROUND

I.

KAREN FILES A PETITION FOR LEGAL SEPARATION, GEORGE FILES A RESPONSIVE DECLARATION, AND THE TRIAL COURT ORDERS GEORGE TO MAKE A $50,000 PAYMENT TO KAREN.

In August 2010, Karen filed a petition for legal separation (the petition), which stated she and George were married in November 1996 and separated in June 2010, and that they had three minor children. The petition requested, inter alia, that property rights be determined. Karen specifically requested that her clothing, jewelry, gifts, personal effects, premarriage and postseparation earnings and accumulations, and "[o]ther separate property presently unknown to [her]" be confirmed as her separate property. The petition also listed real property located on Bergamo in Laguna Niguel (Bergamo property) and real property located on Miramar in Laguna Beach (Miramar property), as falling within the category of "community and quasi-community assets and debts."

In September 2010, George filed a responsive declaration. In January 2011, the parties stipulated, and the court ordered, inter alia, that George make a $50,000 unallocated and uncharacterized payment to Karen, subject to the court's determination at trial.

II.

FOLLOWING AN UNCONTESTED TRIAL ON THE PETITION, JUDGMENT IS ENTERED.

Trial on the petition was noticed for December 9, 2013, but George, who was not then represented by counsel, did not appear.[2] The trial court's minute order from

[2] In July 2012, trial was held on the issue of the validity and enforceability of a marital agreement dated May 29, 2010; George appeared at that trial. The trial court found that agreement was not valid or enforceable and that Karen had breached her fiduciary duty.

that day stated: "The Court finds that [George] voluntarily made himself absent today." An uncontested trial was held in George's absence. The court thereafter made orders regarding support and the division of property, based on evidence provided by Karen.

The judgment of legal separation was entered on December 20, 2013, which included the court's orders regarding the division of assets; the judgment did not state that any issue was reserved. The judgment set forth the division of the parties' considerable number of assets, including real property holdings and accounts. As relevant to the issues on appeal, the court awarded Karen "[a]ll rights, title and interest in the community property interest" of, and all liens and encumbrances on, the Bergamo property, and similarly awarded George "[a]ll rights, title and interest in the community property interest" of, and "all liens and encumbrances" on, the Miramar property.

The judgment ordered George to pay Karen $604,209 as an "[e]qualization of division of property and debt orders." (Boldface omitted.) The judgment confirmed that two Charles Schwab IRA's in Karen's name (the IRA's) were Karen's separate property. Notice of entry of judgment was served on the parties on January 8, 2014.

III.

GEORGE UNSUCCESSFULLY MOVES TO VACATE THE JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 473, SUBDIVISION (b).

On June 11, 2014, George, who was then represented by counsel, filed a motion to set aside a default judgment, under section 473, subdivision (b) of the Code of Civil Procedure. George asserted he had failed to attend the trial because he had fallen asleep and woke up after the trial had concluded and that, in his absence, Karen had failed to disclose his separate property interest in property that led to the large equalization payment.

The trial court denied the motion to vacate judgment as follows: "[Family Code section] 215 requires that post-judgment matters be personally served on the party. That did not occur here within the time requirements of [Code of Civil Procedure

section]473, or within a reasonable time under the code. The motion was not timely served within the six month deadline for relief under [section] 473[, subdivision](b), or within a reasonable time under the code." The court's order further stated that Family Code section 2107, subdivision (d) "does not require an automatic set aside of a judgment without a showing that the failure to disclose materially affected a portion of the judgment. [Citation.] [George] failed to make such a showing. The argument was that [Karen] did not divide the property in a manner that would have occurred had [George] appeared is not a disclos[ur]e issue." George did not appeal from that order.

IV.

GEORGE FILES A REQUEST FOR AN ORDER UNDER FAMILY CODE SECTION 2556 SEEKING REIMBURSEMENT OF SEPARATE PROPERTY CONTRIBUTIONS, CHARACTERIZATION OF THE $50,000 PAYMENT AS COMMUNITY PROPERTY, AND A FINDING THAT THE CONFIRMATION OF THE IRA'S AS KAREN'S SEPARATE PROPERTY IS VOID; THE TRIAL COURT DENIES HIS REQUEST AND GEORGE APPEALS.

In March 2015, George filed a request for an order which, as amended in May 2015, sought as relevant to this appeal: (1) the "[a]llocat[ion of] advanced payments" made by George, which were "subject to allocation at time of trial but were not allocated at trial"; (2) an order setting aside void portions of the judgment; (3) the correction of an unspecified clerical error in the judgment; (4) reimbursement under Family Code section 2556 for George's separate property contributions to real property; and (5) the characterization of the $50,000 payment made by George to Karen under section 2556. As described by the trial court, "[t]he gist of the motion is that there was fraud by [Karen] in that she did not honestly present evidence of [George]'s income used to calculate the support order; she did not tell the court that [George] had a separate property interest in the real property which affected the amount of equalization payment [George] was ordered to pay [Karen]; the judgment failed to address a $50k distribution made earlier in the action; and the court confirmed some separate property as [Karen]'s,

although [George] doesn't challenge the fact as to whether that was her separate property."

The trial court denied the amended request. George appealed from the order; his notice of appeal stated in part, "[s]aid Order pertains to issue regarding the Judgment, including but not limited to omitted assets/liabilities pursuant to Family Code §2556, orders that should have been voided, mis-characterization or lack of characterization of assets and income and fraud."

DISCUSSION

I.

THE JUDGMENT OF LEGAL SEPARATION IS THE FINAL AND CONCLUSIVE ADJUDICATION OF GEORGE'S AND KAREN'S PROPERTY RIGHTS.

"[A] judgment of legal separation (formerly a decree of separate maintenance) is designed to resolve the financial issues between the parties, including division of community assets and liabilities and determination of support obligations. [Citations.] A judgment for legal separation, however, is not an interim order. It serves as a final adjudication of the parties' property rights and is conclusive and res judicata even in a subsequent proceeding to dissolve the marriage." (*Estate of Lahey* (1999) 76 Cal.App.4th 1056, 1059; *Faught v. Faught* (1973) 30 Cal.App.3d 875, 878 ["[A] decree of separate maintenance . . . operates as a final adjudication of such financial aspects of the matrimonial relationship as spousal support, division of community property, and settlement of property rights, and to the extent the decree deals with such matters it is conclusive."].)

The judgment is a final and conclusive adjudication of George's and Karen's property rights because George did not appeal from it. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 13.) "The division of assets and liabilities cannot be modified after it has become final unless there is an explicit reservation of jurisdiction to

do so." (*In re Marriage of Farrell* (1985) 171 Cal.App.3d 695, 702.) Here, the trial court did not retain jurisdiction over any issue.

Once a judgment of property division becomes final, it can be set aside only by a timely appeal; a set-aside motion pursuant to Code of Civil Procedure section 473, subdivision (b); or, on statutorily prescribed grounds after the time for section 473 relief expires, a set-aside proceeding (Fam. Code, § 2120 et seq.). (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2016) ¶ 17:340, pp. 17-114 to 17-115.) The grounds and time limits for a set-aside motion under Family Code section 2121 are contained in Family Code section 2122. Those grounds include actual fraud, perjury, duress, mental incapacity, mistake of law or fact (stipulated judgments only), and failure to comply with certain disclosure requirements. (Fam. Code, § 2122.) George's motion under Code of Civil Procedure section 473, subdivision (b) was denied; George did not appeal from that order. Our record does not show he filed a set-aside motion pursuant to Family Code section 2121 or 2122, and no issue under those code sections is presented in this appeal.

Instead, over 14 months after the judgment was entered, and then invoking, inter alia, Family Code section 2556, George filed a request for an order seeking reimbursement for his separate property contributions to the Bergamo property and the Miramar property, the characterization of his pretrial $50,000 payment to Karen, and modification of the judgment, striking the portion confirming the IRA's as Karen's separate property. For the reasons we will explain, the trial court did not err by denying George's request.

II.

GEORGE'S REIMBURSEMENT CLAIM FOR SEPARATE PROPERTY THAT HE CONTRIBUTED TO BERGAMO PROPERTY AND MIRAMAR PROPERTY.

In his opening brief, George argues the trial court erred by denying his request for an order, in which he sought the right to pursue his recovery of the $455,661

of his separate property that he contributed to the downpayment for the Bergamo property and the $264,000 of his separate property that he used to reduce the mortgage on the Miramar property. He argues, "[t]he facts and amounts of George's reimbursement claims for his [separate property] contributions to the Bergamo and [Miramar] properties under Family Code section 2640 were not part of the evidence admitted and considered by the trial court" and that this court should (1) reverse the judgment as to the trial court's findings and orders as to the Bergamo property and the Miramar property; (2) "[f]ind that George's rights of reimbursement for his contributions to the . . . Bergamo and Laguna Beach (Miramar) properties pursuant to Family Code section 2640 are omitted liabilities of the community and are justiciable under Family Code section 2556"; and (3) "[d]irect the trial court to afford George the opportunity to present evidence tracing his contributions to the Bergamo and Laguna Beach properties to separate property sources."

The general rule is that a spouse's claim for reimbursement may be forfeited if not timely asserted. "[J]ust because a spouse may have a right to request reimbursement does not mean the family law court has a sua sponte duty to consider the possibility. With regard to the use of postseparation earnings to, in effect, preserve a community asset [citation], reimbursement is not automatic, but involves the consideration of such a variety of factors [citation] that the onus must necessarily be on the paying spouse to specifically request reimbursement. Further, even reimbursement under [Family Code] section 2640 (establishing right of reimbursement for separate property contributions to the acquisition of community property, including payments that reduce loan principal) requires the paying spouse to *trace* contributions to a separate property source. If the paying spouse simply sits back and does nothing, there will be no reimbursement." (*In re Marriage of Feldner* (1995) 40 Cal.App.4th 617, 624-625.)

George did not show up at trial and did not present evidence tracing contributions to the Bergamo property and the Miramar property to his separate property. Consequently, he did not receive reimbursement for those contributions in the judgment.

George then sought to avoid forfeiture of his reimbursement claim by invoking Family Code section 2556 and characterizing his separate property contributions as an omitted or unadjudicated community estate debt.

Family Code section 2556 provides: "In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order *to obtain adjudication of any community estate* asset or *liability omitted or not adjudicated by the judgment.* In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability." (Italics added.)

The trial court rejected George's argument, stating: "Here the judgment disposed of the two properties apparently without regard to [George]'s alleged separate property contribution to the purchase of those properties. Here the court characterized, valued and divided the properties at trial. That would normally include a determination of any separate property interests in those properties. [George] now seeks to change that division as to those assets by seeking a determination of his separate property claim, which he failed to raise at trial. . . . The assets have been litigated and all the claims that apply to their division, including separate property interest in them, would appear to be subject to res judicata. . . . [George] can't fail to raise it at trial and seek to resurrect it on a [Family Code section] 2556 motion."

In re Marriage of Mason (1996) 46 Cal.App.4th 1025, cited by the trial court, is on point. In that case, a husband and wife entered into a stipulated judgment dividing their assets and providing spousal support for the wife. (*Id.* at p. 1027.) The wife had operated a residential care facility but closed it because of her poor health.

(*Ibid.*) Two months later, the husband moved to set aside the judgment on the ground the wife had "concealed income and was reopening the care facility." (*Ibid.*) The trial court denied the motion to set aside the judgment and the property division, stating that the wife had at one point closed down the facility. (*Ibid.*) The appellate court in a prior unpublished opinion had affirmed the trial court's order, concluding that the husband could "not set aside the property division solely because wife was industrious or had the good fortune to locate another place to operate a care facility." (*Ibid.*) The husband then filed an order to show cause seeking the division of the value of the facility's goodwill as an omitted community asset within the meaning of Family Code section 2556. (*In re Marriage of Mason, supra*, at p. 1027.)

In *In re Marriage of Mason*, the trial court denied the husband's motion as follows: "[T]he 'business was not an omitted asset. It was a known asset. It was a[n] asset of which there was a division. They divided it. They divided the physical assets of this business. And if [husband] . . . didn't raise the goodwill issue that's his tough luck. But this is an adjudicated asset, it's not [a]n omitted asset. [¶] And there's no way that you can transform this from an adjudicated asset to an omitted asset simply by arguing that your client didn't raise the issue of goodwill at the proper time.'" (*In re Marriage of Mason, supra*, 46 Cal.App.4th at pp. 1027-1028.) The appellate court affirmed the trial court's order, but on different grounds, stating: "We do not reach the merits of the goodwill issue on this appeal. The prior motion to set aside the property division was based on the theory that wife deceived husband and concealed her ability to reopen the business. Husband lost in the trial court and lost on appeal. The doctrine of res judicata bars husband from resurrecting the fraud claim based on the new theory that business goodwill was an 'omitted' asset. '"A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable." [Citation.].' [Citation.] Were the rule to the contrary husband

could search for yet a new theory and mount a third attack upon the stipulated judgment." (*Id.* at p. 1028.)

Here, we conclude, like the husband's goodwill claim in *In re Marriage of Mason, supra*, 46 Cal.App.4th 1025, George's claim for reimbursement of his separate property interest does not constitute an omitted or unadjudicated community estate liability within the meaning of Family Code section 2556. The division of the parties' interests in the Bergamo property and the Miramar property was adjudicated by the judgment after a trial and, thus, those interests were not omitted. George's argument that his separate property interests within those assets constitute an omitted or unadjudicated community estate liability within the meaning of section 2556 is without any legal support.

Furthermore, George had previously pursued his claim for such reimbursement in his prior motion to vacate the judgment, which was denied by the trial court and from which he did not appeal. Therefore, George's reimbursement claim is barred by the doctrine of res judicata as well. (*In re Marriage of Mason, supra*, 46 Cal.App.4th at p. 1028.) We find no error.

III.

GEORGE'S UNCHARACTERIZED $50,000 PAYMENT TO KAREN

George argues Family Code section 2556 applies to allow adjudication of the proper characterization of George's pretrial $50,000 payment to Karen, which, he contends, was an unadjudicated asset. George, however, has failed to demonstrate that the trial court did not adjudicate the $50,000 payment in the judgment or that the payment was not taken into account in the calculation of the $604,209 equalization payment contained in the judgment.

In rejecting George's argument, the trial court stated: "[George]'s derivative argument that the equalization payment has to be adjusted to reflect his separate property claim also fails. [¶] . . . [¶] Earlier in the action, the court ordered a

distribution to [Karen] of $50k which was uncharacterized at the time and subject to characterization at trial. [George] argues [he] failed to appear for trial and it wasn't specifically addressed. However, the court made an equalization award in favor of [Karen], which included any adjustment in favor of [George], if the court found [George] should have been awarded the full $50k. It was part and parcel of the equalization determination and [George] failed to raise it at trial. [George]'s claim appears to fail for the same reason the separate property claim fails."

George could have requested a statement of decision, but he did not. "Without a statement of decision, and timely objections to any ambiguities or omissions in it, the doctrine of implied findings applies." (*County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 438.) "The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment. [Citation.] The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error. [Citations.]" (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) Because George has failed to demonstrate that the $50,000 payment was omitted from adjudication, the trial court did not err by denying his request for an order as to that payment.

IV.

THE IRA'S

George challenges the judgment's confirmation of the IRA's as Karen's separate property. George argues that he was not given notice of all of Karen's separate property claims before trial and, thus, under section 580 of the Code of Civil Procedure, that portion of the judgment must be vacated because it provided relief that exceeded the scope of the petition and the trial court's jurisdiction. Section 580, subdivision (a)

provides that "[t]he relief granted to the plaintiff, *if there is no answer*, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115; *but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue*. The court may impose liability, regardless of whether the theory upon which liability is sought to be imposed involves legal or equitable principles." (Italics added.)

In rejecting George's request for an order vacating the court's confirmation of the IRA's as Karen's separate property, the trial court stated: "[George]'s argument is based on [Code of Civil Procedure section]580 which provides that when there is 'no answer', the relief granted cannot exceed that demanded in the complaint. However, the statute then goes on to state, 'but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue.' All the other authority cited by [George] . . . involves the duty on default, which don't apply here. [¶] As argued by [Karen], [George] did file a response to the petition, he filed various requests for orders and participated in a bifurcated trial on the validity of the prenuptial agreement prior to the 12/09/13 trial. [Karen]'s petition also stated that she would be seeking division of property, listed some separate property and stated a claim for other separate property presently unknown to [Karen]. [George] did not allege that he was not put on notice during the litigation that she would be seeking confirmation as her separate property that which was awarded to her in the judgment. It appears that in this non default proceeding, the confirmation of separate property to [Karen] was consistent with the case made by the petition and embraced within the issue. [George] had an opportunity to defend and did not appear for trial."

Our record supports the reasons set forth in the trial court's order denying George's request. Although George might not have known Karen was claiming the IRA's as her separate property until he received a copy of her trial brief the day after trial, his lack of awareness did not affect the court's jurisdiction to adjudicate those assets and

confirm them as Karen's separate property. To the extent George contends insufficient evidence supported the court's characterization of the IRA's as Karen's separate property, George forfeited that argument by failing to appeal from the judgment. The trial court properly denied George's request.

DISPOSITION

The order is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.